

PACIFICORP

IBLA 95-117

Decided May 12, 1998

Appeal from a decision issued by the Price River Resource Area Manager, Bureau of Land Management, partially rejecting justifications for failure to mine at the maximum mining height on Federal coal lease No. U-024319.

Set aside and referred for a hearing.

1. Administrative Procedure: Hearings—Coal Leases and Permits: Generally—Coal Leases and Permits: Leases—Evidence: Burden of Proof—Hearings—Rules of Practice: Appeals: Hearings

A BLM decision partially rejecting a coal lessee's answer to a Notice of Noncompliance may be set aside and the matter referred for a hearing when it is found that the record contains significant, unresolved disputes of fact.

APPEARANCES: John S. Kirkham, Esq., and Michael W. Devine, Esq., Salt Lake City, Utah, for PacifiCorp; Bruce Hill, Esq., Office of the Field Solicitor, and David K. Grayson, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

PacifiCorp has appealed the September 26, 1994, "Decision on Response to Notice of Noncompliance, PacifiCorp, Deer Creek Mine, 3rd East Longwall Panel" (Decision), issued by the Price River Resource Area Manager, Bureau of Land Management (BLM or Bureau), partially rejecting PacifiCorp's justification for failing to mine at a mining height of 11.5 feet. The Decision also directed PacifiCorp to maintain a minimum average mining height of 9.6 to 10.0 feet in areas with coal seam thicknesses equalling or exceeding 10.0 feet, to include weekly mining height profile measurements on monthly production maps, and to submit reports justifying any deviation from the minimum average mining height. By Order dated January 12, 1995, the Board stayed the effectiveness of BLM's Decision pending resolution of this appeal.

PacifiCorp is the lessee of Federal coal lease No. U-024319 and operates the Deer Creek Mine under a BLM-approved Resource Recovery and Protection Plan. ^{1/} On March 31, 1994, BLM issued a Notice of Noncompliance to PacifiCorp for failure to comply with the approved Resource Recovery and Protection Plan and conduct operations in a manner designed to prevent wasting of coal and conserve recoverable coal reserves. The Bureau found that when PacifiCorp reduced the mining height, leaving bottom coal in the 3rd East longwall panel without prior BLM approval, PacifiCorp had violated the Resource Recovery and Protection Plan mandate that when difficult mining conditions, unforeseen geologic conditions, regulatory restrictions, or degradation of minable coal quality make it necessary to deviate from the Resource Recovery and Protection Plan the contemplated deviation must first be discussed and approved by the appropriate BLM official. The Bureau determined that to achieve the maximum economic recovery of Federal coal, PacifiCorp was required to increase the 8.5 to 9-foot mining height then in use to 10.5 to 11.5 feet. Accordingly, BLM advised PacifiCorp that, to correct the noncompliance, PacifiCorp must either increase the mining height to the maximum operating height of the longwall equipment and recover the bottom coal, or provide justification for the current mining height and explain why mining at an 11.5-foot mining height was impossible. PacifiCorp was given 30 days from receipt to correct the noncompliance and file an appeal.

PacifiCorp requested an extension of time to submit justification for continuing mining at the mining height then in use, and an extension was granted on April 22, 1994. The extension decision noted that BLM would also need additional time to decide the sufficiency of PacifiCorp's response and issue an appealable decision, but further stated that the time for appealing the initial Notice was running. Accordingly, PacifiCorp appealed the Notice to this Board (IBLA 94-763). By Order dated October 6, 1994, the Board dismissed PacifiCorp's appeal as premature. ^{2/}

PacifiCorp filed its response to the Notice of Noncompliance on May 12, 1994. In its response, PacifiCorp identified three factors circumscribing the mining height at the Deer Creek Mine: longwall extraction equipment design limitations; achievable mining height; and regulatory restrictions. PacifiCorp explained that the maximum extended height of its longwall mining equipment was 132 inches, a 12-inch buffer was necessary to facilitate horizon control and insure positive contact with the immediate roof when minor spalling was occurring, and the actual maximum mining height was 120 inches. It noted that, although a 120-inch maximum

^{1/} The case file contains various plan modification applications and approvals, but does not contain a copy of the original Resource Recovery and Protection Plan.

^{2/} Both PacifiCorp and BLM criticize certain aspects of the other's activities leading to dismissal of this first appeal. However, none of the alleged procedural irregularities affects the current proceeding.

achievable mining height was possible, considering only the equipment configuration and capacity, the actual achievable mining height depended on those factors plus coal seam and geological conditions, including longwall face length and gateroad design, as well as operational considerations such as health, safety, regulatory restrictions, and degradation of mined coal quality. PacifiCorp elaborated on regulatory restrictions affecting achievable mining height, specifically ventilation system and dust control requirements. It asserted that all feasible system improvements to enhance free air delivery to the working faces had been implemented, and that secondary spalling occurring when mining near or at the maximum mining height generated respirable dust and degraded air quality at the face. PacifiCorp concluded that, given these parameters, it was achieving maximum economic and practical recovery of coal at the current mining heights.

In his September 26, 1994, Decision, the Area Manager agreed with PacifiCorp's justification for its inability to achieve and maintain the 11.5-foot mining height set by BLM, but determined that PacifiCorp had not adequately defended continued operation at its then current mining height (8.6 to 9.2 feet). Based on an August 2, 1994, staff report which was attached to the Decision, the Area Manager found that

the longwall equipment configuration is compatible and can achieve a mining height greater than 10 feet, as documented on the monthly production maps. The BLM also finds PacifiCorp's theoretical achievable "average" longwall mining height to be overly conservative when consideration is given to the actual capabilities of the equipment and the existing gateroads. These factors are not as limiting as PacifiCorp presents. Furthermore, the BLM was unable to verify any adverse mining or geologic conditions which would prevent an average mining height of 9.6 to 10.0 feet. Finally, the BLM finds, PacifiCorp is well within the limits imposed by Federal regulation standards regarding respirable dust (not to exceed 2.0 mg/ml). In addition, the BLM has shown that an additional 20,800 cfm of air can be made available to the active longwall face.

The BLM has determined * * * in areas of the Deer Creek Mine where seam thickness exceeds or is equal to 10.0 feet, a minimum average mining height of 9.6 to 10.0 feet must be maintained. Weekly mining height profile measurements (approximately 50-foot intervals) must be included on the monthly production maps submitted to the BLM. In the event the operator/lessee fails to maintain the aforementioned average mining height, a report justifying the shortfall must be submitted to the BLM for approval.

(Decision at 2.)

In the attached staff report, BLM disputed PacifiCorp's analysis of the height limits of some of the mining equipment. The staff did not accept PacifiCorp's statement that the tolerances of the existing face

conveyor limited the operations to no more than a 1 to 2-percent slope and mandated a 150-foot graded zone, and stated its position that the actual vertical flexibility tolerance of the face conveyor sustained a 12-percent slope and a 25-foot graded zone. Using the shorter 25-foot graded zone, the actual gateroad height of 8.0 to 8.5 feet, ^{3/} and a maximum mining height of 120 inches, BLM's staff calculated a 9.93 to 9.95-foot average achievable mining height for the 3rd East longwall panel. PacifiCorp had calculated the height at 9.57 to 9.68 feet.

The staff report also rejected PacifiCorp's contention that compliance with regulatory restrictions governing ventilation and dust control compelled an actual average mining height lower than the theoretical average achievable mining height, noting that PacifiCorp currently complied with all applicable Federal regulations. The staff report found that air flow sufficient to allow an average mining height in the range of 9.6 to 10.5 feet would be available if PacifiCorp sealed the abandoned 1st West mine face and diverted the additional air to the 3rd East longwall panel and improved the efficiency of its overall ventilation system. The report concluded that PacifiCorp had supported its failure to mine at the 11-foot maximum operating range of its equipment, but it had not justified the current mining height of 8.6 to 9.2 feet.

On appeal, PacifiCorp contends that it conducts its operations at the Deer Creek Mine in accordance with the approved Resource Recovery and Protection Plan and in compliance with the regulatory standards prohibiting wasting of coal and requiring maximum economic recovery of coal reserves. PacifiCorp claims that its mining height does not violate the Resource Recovery and Protection Plan because nothing in the approved plan addresses mining height. PacifiCorp submits that its mining practices do not constitute waste or represent a failure to achieve the recovery rate contemplated by the Resource Recovery and Protection Plan, given that the actual mining height reflects a careful analysis of safety factors, available equipment, overall coal bed thickness, and maximum economic recovery, all of which are performance standards applicable to the Resource Recovery and Protection Plan.

Noting that maximum economic recovery determinations hinge on standard industry operating practices, including local and regional practices, PacifiCorp insists that it has amply demonstrated that the mining height

^{3/} In the staff report, BLM criticized the 8.0 to 8.5-foot height of the gateroad entry but admitted that the entry height conformed to local industry practice and optimized entry stability, asserting that although this entry configuration was economical, it prevented maximum economic recovery. The Bureau advised PacifiCorp to reconsider what it considered overly conservative limits of the gateroad height design factor and suggested that a gateroad height of 9.5 or 10.0 feet be used to determine the theoretical average longwall mining height. The Bureau did not use this increased mining height in its calculations.

it uses fully conforms to those practices. It states that BLM recognized this fact, but improperly discounted it. PacifiCorp asserts that BLM has offered no evidence showing that the mining height it is attempting to mandate is derived from standard industry operating practices or emanates from the specific factors relevant to the maximum economic recovery determination. PacifiCorp avers that the mining height requirement BLM seeks to impose improperly ignores the mining height restrictions dictated by equipment configuration, adverse mining and geologic conditions, safety requirements, and ventilation system design limitations.

PacifiCorp states that sealing the abandoned 1st West mine section and diverting air from that area to the 3rd East longwall panel, as proposed by BLM, is not feasible because the 1st West section is a critical component of the mine dewatering system and, in any event, sealing that section of the mine would not free a significant amount of air for the 3rd East longwall panel. PacifiCorp maintains that the BLM Decision provides no reasoning justifying the increased mining height, and that mining at the height being imposed by BLM would result in a negligible change in coal production. ^{4/}

PacifiCorp also argues that BLM's Decision is arbitrary and capricious because BLM is mandating changes in mine design and operation based on the judgment of individual BLM inspectors, rather than on regulatory standards and applicable guidelines. PacifiCorp asserts that the Decision is technically deficient because it does not identify any provision of the Resource Recovery and Protection Plan as the basis for the finding that PacifiCorp is in noncompliance or explain how PacifiCorp has changed the Resource Recovery and Protection Plan by mining at the current mining height.

PacifiCorp further contends that BLM's Decision conflicts with Departmental policy and guidelines establishing the primary role of standard industry operating practices in maximum economic recovery determinations and recognizing the need for leaving sufficient top coal to provide primary roof support. PacifiCorp maintains that BLM's Decision is arbitrary and capricious and must be vacated because no connection exists between the facts presented and the conclusion reached.

^{4/} PacifiCorp states that its actual coal production exceeds the estimated recovery using the BLM mandated mining height and BLM coal density figures. In a staff report attached to BLM's Answer, BLM suggests that the higher coal density figures used by PacifiCorp may indicate that the company is improperly reporting and/or allocating coal production. PacifiCorp has vehemently objected to this speculation, asserting that it amounts to an accusation of criminal conduct. The staff report also complains that PacifiCorp denied BLM access to company property and interfered with Government duties. PacifiCorp contends that these charges are inaccurate and deceptive. The appealed Decision does not discuss these issues and we do not deem them to be relevant to the appeal before us.

In its Answer, which includes an additional staff report, BLM denies that PacifiCorp has shown error in its Decision mandating an increased mining height and insists that the company's mining practices are leaving unrecoverable Federal coal in the mine. The Bureau concedes that the Resource Recovery and Protection Plan contains no specific references to recoverable coal reserves and longwall mining height, but argues that these issues fall within the overall scope of the Resource Recovery and Protection Plan. The Bureau contends that its Decision does not require PacifiCorp to change the design and operation of the mine, pointing out that, despite its criticism, it adopted PacifiCorp's gateroad design parameters when computing the achievable mining height for the 3rd East longwall panel. The Bureau disagrees with PacifiCorp's analysis of the limits of its ventilation system and asserts that PacifiCorp has provided no supplementary ventilation survey simulation data demonstrating that sealing the 1st West mine section would result in an insignificant increase in the airflow to the 3rd East longwall panel. According to BLM, PacifiCorp has not shown that geologic conditions in the mine create the potential for secondary spalling if PacifiCorp mined at or near the maximum mining height, or that these alleged adverse conditions would cause economic losses, respirable dust, or safety problems. The Bureau further suggests that PacifiCorp's chosen cutting sequence conflicts with prudent mining practices and exacerbates the existing spalling tendencies.

The Bureau also states that PacifiCorp's failure to offer proof of comparable standard industry operating practices thwarts its attempt to justify the mining height limitations PacifiCorp suggests because BLM cannot accept an allegation of such practices without supporting evidence. It argues PacifiCorp's mining operations do not conform with standard industry operating practices because the industry standard is to seek maximum coal recovery, and PacifiCorp's mining at less than the achievable mining height prevents maximum recovery. According to BLM, maximum economic recovery for this phase of the mining operation cannot be determined from the information currently available. In sum, BLM denies that its Decision is arbitrary and capricious and asks the Board either to uphold the Decision or refer the matter to the Hearings Division for a formal hearing to resolve disputed technical facts.

In response, 5/ PacifiCorp contends that BLM has the burden of establishing that its practices vary from standard industry operating practices, the primary determinant of maximum economic recovery, and that BLM's failure to carry that burden mandates a ruling against the agency. PacifiCorp maintains that it has provided extensive evidence demonstrating that its

5/ Counsel for BLM objected to PacifiCorp's request to file a response to the Answer, characterizing the request as a delaying tactic. We reject BLM's objections and have considered both PacifiCorp's response and BLM's reply to PacifiCorp's response. PacifiCorp's request also included a statement that it would accept BLM's proposal that the matter be referred to the Hearings Division.

mining practices correspond to standard industry operating practices and result in maximum economic recovery of Federal coal and disputes BLM's findings to the contrary. PacifiCorp insists that BLM has produced no factual information establishing that the current mining height varies from or violates any condition of the approved Resource Recovery and Protection Plan. It iterates its prior argument that the Decision contradicts BLM internal directives regarding maximum economic recovery determinations and represents an improper exercise of virtually unlimited discretionary power.

In reply, BLM moves that this proceeding be assigned to the Hearings Division, arguing that significant technical factual disputes regarding whether PacifiCorp is achieving maximum economic recovery of Federal coal must be resolved before the Board can decide the factual and legal issues raised and that confronting these disputes in a hearing would be more efficient than addressing them through numerous affidavits. The Bureau also asserts that PacifiCorp has the burden of establishing that its operations follow standard industry practices. The Bureau asks for a reasonable amount of time to submit affidavits and other exhibits addressing the factual disputes if the Board elects to deny its hearing request.

[1] A lessee or operator must conduct its operations in accordance with the rules in Part 3480, the terms of its lease, its approved resource recovery and protection plan, and any orders of an authorized officer. It is also obligated to prevent wasting of coal during production and to protect recoverable reserves upon abandonment. 43 C.F.R. § 3481.1(b) and (c).

The general performance standards require a lessee or operator to conduct operations to achieve maximum economic recovery of Federal coal. 6/ 43 C.F.R. § 3484.1(b)(1). The provisions of 43 C.F.R. § 3480.0-5(a)(21) define maximum economic recovery as meaning

that, based on standard industry operating practices, all profitable portions of a leased Federal coal deposit must be mined. At the times of [maximum economic recovery] determinations, consideration will be given to: existing proven technology; commercially available and economically feasible equipment; coal quality, quantity, and marketability; safety, exploration, operating, processing, and transportation costs; and compliance with applicable laws and regulations. The requirement of [maximum economic recovery] does not restrict the authority of the authorized officer to ensure the conservation of the recoverable coal reserves and other resources and to prevent the wasting of coal.

6/ An explanation of how maximum economic recovery will be achieved must be included in a resource recovery and protection plan submitted for BLM approval, and BLM cannot approve a resource recovery and protection plan submitted by the mine operator until it is satisfied that the plan will achieve maximum economic recovery of the Federal coal. See 43 C.F.R. §§ 3482.1(c)(7) and 3482.2(a)(2); Cyprus Shoshone Coal Corp., 143 IBLA 308, 315-318 (1998).

The general performance standards also require a lessee or operator to conduct efficient operations to recover the recoverable coal reserves, prevent wasting of coal, and conserve those reserves and other resources. 43 C.F.R. § 3484.1(b)(4). See generally, Utah Power & Light Co., 118 IBLA 181, 194-95, 98 I.D. 97, 104-105 (1991).

The crux of this case is whether BLM properly issued the Notice of Noncompliance because PacifiCorp's average mining height in the 3rd East longwall panel did not achieve maximum economic recovery of the Federal coal. We agree with BLM's statement that numerous significant and disputed technical factual issues must be resolved to ascertain PacifiCorp's compliance with the maximum economic recovery requirement. Under 43 C.F.R. § 4.415, the Board has discretionary authority to refer a case to an administrative law judge for a hearing on an issue of fact, and where there are significant unsettled factual or legal issues which cannot be decided based on the record without a hearing, the Board will exercise its discretion and refer the case to the Hearings Division, Office of Hearings and Appeals, for a hearing on those questions. See Yates Petroleum Corp., 131 IBLA 230, 235 (1994); Jerome P. McHugh & Associates (On Reconsideration), 117 IBLA 303, 307 (1991); Norman G. Lavery, 96 IBLA 294, 299 (1987); Woods Petroleum Co., 86 IBLA 46, 55 (1985). The factual questions raised by PacifiCorp and BLM unequivocally necessitate referring this case for a hearing. We therefore grant BLM's motion for a hearing.

As just noted, this case arises from a BLM issued Notice of Noncompliance. At the hearing BLM, as the proponent of the rule or order, shall have the burden of going forward and presenting evidence that PacifiCorp failed to comply with the approved Resource Recovery and Protection Plan and failed to conduct operations in a manner designed to prevent wasting of coal and conserve recoverable coal reserves when it failed to maintain a minimum average mining height of 9.6 to 10.0 feet when the seam thickness was equal to or exceeded 10.0 feet. PacifiCorp will then have the burden of overcoming BLM's case by a preponderance of the evidence. Klump v. BLM, 130 IBLA 119, 129 (1994); BLM v. Ericsson, 88 IBLA 248, 255 (1985).

As a part of its prima facie case that PacifiCorp has failed to maintain maximum economic recovery while operating pursuant to an approved Resource Recovery and Protection Plan, BLM will have the burden of setting out what constitutes standard industry operating practices, how PacifiCorp has deviated from those practices, and how that deviation has resulted in a failure to maintain maximum economic recovery. Utah Power & Light Co., *supra*, at 198, 97 I.D. at 107. PacifiCorp will then have the burden of overcoming BLM's case by showing that its mining operation conformed to the Resource Recovery and Protection Plan and standard industry operating practices, thereby achieving maximum economic recovery, and prevent the wasting of coal.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary, 43 C.F.R. § 4.1, the Decision appealed from is

set aside and the case is referred for hearing and decision by an administrative law judge, which will be final for the Department in the absence of a timely appeal to this Board.

R.W. Mullen
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge

